STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois, Petitioner	)	
Rate MAP-P Modernization Action Plan – Pricing Annual Update Filing	)	Docket No. 13-0301

SUPPLEMENTAL MOTION OF AMEREN ILLINOIS COMPANY TO STRIKE PORTIONS OF THE REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to 83 Ill. Adm. Code § 200.190, Ameren Illinois Company d/b/a Ameren Illinois (AIC) respectfully moves to supplement its Motion to Strike Portions of the Initial Brief of the Staff of the Illinois Commerce Commission (filed October 9, 2013) (Motion to Strike) to include certain portions of the Reply Brief of the Staff of the Illinois Commerce Commission (Staff). The objectionable statements have been identified in the accompanying Supplemental Appendix.

The statements from Staff's Reply Brief identified in the Supplemental Appendix—like the statements from Staff's Initial Brief identified in the Appendix to the October 9, 2013 Motion to Strike—are not legal arguments unveiled for the first time in briefing; they are new expert opinions and Staff positions that were not timely disclosed and not included in the record. It would be a violation of the principles of due process for the Commission to now permit new expert opinions and Staff positions for the first time in a reply brief, without AIC having the opportunity to rebut and examine Staff on these assertions. It also would be reversible error for the Commission to rely upon new expert opinions and Staff positions not already in the record. A coordinated case schedule was established to allow for the orderly presentation of evidence and the parties' non-legal positions. Staff's attempt to add new testimony in briefs upends that

schedule. For these reasons and for the reasons presented in the October 9, 2013 Motion to Strike, the portions of Staff's Reply Brief identified in the Supplemental Appendix must be not considered and not included in the Commission's final order in this case. AIC respectfully requests issuance of an order striking the Reply Brief statements of Staff so identified.

I. BACKGROUND

The new expert opinions and Staff positions—without record support and offered for the first time in Staff's Reply Brief—concern four contested issues: Miscellaneous Operating Revenues – ARES; Purchases – Other (Account 588); Other Credit Card Purchases; and Advertising and Public Relations Expense. In this proceeding, the Case Management Plan (issued June 4, 2013) required Staff and Intervenor rebuttal testimony to AIC and to each other to be filed on August 26, 2013. The statements in the Supplemental Index should have been included in Staff's rebuttal, or alternatively, procured through cross-examination at the evidentiary hearing. Neither occurred. The statements are not legal arguments Staff waited to make in briefing based on record evidence. They are substantive opinions—even if conjecture—and new positions that should have been sponsored by a Staff witness in pre-filed testimony.

The statements listed in item No. 1 in the Supplemental Appendix purport to support Staff's adjustment to Purchases—Other (Account 588), specifically Staff's adjustment to remove the costs of cable television service at certain AIC operating centers. (Staff Rep. Br. 20.) The statements offer various speculations as to why AIC does not need cable television service. These statements are very similar to the statements listed in item No. 2 in the Supplemental Appendix and items Nos. 8 and 9 in the Appendix to the October 9, 2013 Motion to Strike. Staff's Reply Brief does not provide a record cite for these statements, other than a citation to AIC's Initial Brief. The opinions and positions contained in these statements also do not appear

in Staff's rebuttal testimony in support of its adjustment, thus depriving AIC of the opportunity to challenge them. Staff complains AIC provided additional explanations for specific purchases in surrebuttal testimony "too late for Staff to respond." (Staff Rep. Br. 19.) Staff neglects to mention, however, its adjustment to Account 588 Purchases was not proposed until Staff's rebuttal testimony. Staff cannot fault AIC for responding in surrebuttal testimony to an adjustment first proposed (and arguably improperly so) by Staff in its Rebuttal Testimony.

The statements listed in items Nos. 2 and 3 of the Supplemental Appendix purport to support Staff's adjustment to Other Credit Card Purchases, specifically its adjustment to remove the costs for televisions in operating and storm centers, satellite television service for operating centers and employee cell phones. (Staff Rep. Br. 20-21.) The statements in item No. 2 offer speculation on the necessity of televisions and satellite television service. They are similar to statements in item No. 1 in the Supplemental Appendix and items Nos. 8 and 9 in the Appendix to the October 9, 2013 Motion to Strike. The statements in item No. 3 are new opinions and positions on the necessity and procedures surrounding the purchase of employee cell phone. None of the statements in items Nos. 2 and 3 were disclosed in prefiled testimony; the statements in item No. 3 were not even included in Staff's Initial Brief. Thus, AIC did not have the opportunity to question and rebut Staff on its conjecture. These statements also are not supported by citations to evidence in the record, only by citations to AIC's Initial Brief.

The statements in items Nos. 4-7 are new Staff positions supportive of positions and adjustments advocated by Attorney General (AG) witness Mr. Brosch on the issues of Miscellaneous Operating Revenues – ARES, Potentially Comparable Simantel Expense (Account 909), Other Simantel Expense (Account 930.2) and Other Public Relation Expense (Account 930.2). (Staff Rep. Br. 16, 31-32.) Staff did not express support for or agreement with

the positions and adjustments advocated by Mr. Brosch on these issues, in either Staff's prefiled testimony or Staff's Initial Brief. This deprives AIC of any opportunity to challenge the basis for Staff's adoption of the adjustment. This is in sharp contrast to Staff's review of Mr. Brosch's labor and non-labor expense adjustments in AIC's pending gas rate case, Docket 13-0192. In that proceeding, Staff witness Mr. Kahle reviewed Mr. Brosch's direct testimony, adopted one of Mr. Brosch's non-labor expense adjustments in his rebuttal, and expressly declined to adopt his other labor and non-labor expense adjustments. (ICC Staff Ex. 11, pp. 18-20.) This gave AIC the opportunity to send discovery to Mr. Kahle, respond to Mr. Kahle in surrebuttal, and cross-examine Mr. Kahle at the hearing on his review of Mr. Brosch's testimony. (Ameren Ex. 32.0 (Rev.), pp. 2-10; Ameren Ex. 36.0, pp. 2-5; AIC Cross Ex. 3 (Staff response to AIC-Staff 17.01); Tr. 429.) In AIC's parallel electric rate case however, it appears Staff witnesses did not even review the AG's positions and adjustments until the AG summarized them in its Initial Brief.

It is improper for Staff to use the reply brief as a procedural mechanism to inject new substantive opinions and positions into the record for the Commission's consideration. Post-hearing briefing is not an opportunity to respond to evidence and statements properly offered in a utility's surrebuttal testimony. Post-hearing briefing is also not an opportunity to otherwise bolster your or another party's case in chief. Conjectures like those offered up in items Nos. 1-3 need to be disclosed in testimony; otherwise what opportunity would a utility have to introduce factual evidence that undercuts the speculation. Nor should Staff be permitted to lay in wait and adopt other parties' positions in its reply brief, as is the case for the statements in items Nos. 4-7; otherwise what opportunity would a utility have to test the basis for Staff's adoption. The Commission should not condone either practice, and in this instance, it cannot consider any of the objectionable statements without inviting a reversal. As with the Staff statements identified

in the Appendix to the October 9, 2013 Motion to Strike, the Staff statements identified in the Supplemental Appendix to this motion should not be given any weight by the Commission.

III. ARGUMENT

As noted in the Motion to Strike, Staff has relied upon the approved case schedule elsewhere to control the proper procedure for taking positions. Staff objected to data requests as "inconsistent with the schedule set in this proceeding as reflected in the Case Management Order" that allowed its "final position" to "be communicated in [Staff's] rebuttal testimony scheduled to be filed on August 26, 2013." (ICC Staff Ex. 10.0, Attachment D, AIC-Staff 4.02(d); AIC-Staff 4.20.) Staff also sought to strike "new argument" in AIC's surrebuttal testimony that Staff believed "would unfairly prejudice Staff, and constitute a denial of due process," denied Staff "the opportunity to review and comment on this new argument" and "precluded [Staff] from putting into the record its position on the new argument." (Staff Mtn. to Strike, Sept. 10, 2013, ¶¶ 4-6; Tr. 16:23-17:3.) And Staff's position was accepted.

In other instances however, Staff has sought to admit late new evidence, running afoul of the rules of evidence, the schedule and due process. As noted in the Motion to Strike, Staff tried to improperly supplement its testimony on its credit card expense adjustment with additional opinions, not once, but twice. And twice, Staff's attempt was been rebuffed as improper. The Administrative Law Judges (ALJs) did not permit to Staff to introduce its own data responses as a cross exhibit during Staff's examination of an AIC witness. (Mtn. to Strike, p. 3.) Nor did the ALJs permit Staff to introduce the same data responses as a new exhibit, not previously filed with the Commission and not disclosed on Staff's exhibit list, through its own witness. (*Id*.)

In its Reply Brief, like its Initial Brief, Staff seeks again to rely on new opinions and take new positions in support of adjustments that were not disclosed in Staff's prefiled testimony.

Staff cannot provide the proper citations to evidence Staff submitted, because these "final" positions were not in Staff's rebuttal testimony. And Staff cannot point to a Staff witness who could have been rebutted and cross-examined on these positions, since no Staff witness sponsored these statements. It was inappropriate for Staff to attempt to supplement its testimony by seeking to introduce its own data responses at hearing. It is no more appropriate for Staff to now bolster its and the AG's positions by introducing new opinions and positions in briefing. For the same reasons the ALJs struck the Surrebuttal Testimony of AIC witness Mr. Stafford, the statements of Staff in the Supplemental Appendix also must be stricken.

A. Staff's New Opinions in Support of Its Adjustments and Its New Positions in Support of the AG's Adjustments Were Not Timely Disclosed in Testimony.

As noted in the October 9, 2013 Motion to Strike, due process in administrative proceedings requires "the opportunity to be heard" and "the right to cross-examine adverse witnesses." *Gigger v. Bd. of Fire & Police Comm'rs of City of East St. Louis*, 23 Ill. App. 2d 433, 439 (4th Dist. 1959); *see also Abrahamson v. Ill. Dep't of Prof'l Reg.*, 153 Ill. 2d 76, 95 (1992); *Balmoral Racing Club, Inc. v. Ill. Racing Bd.*, 151 Ill. 2d 367, 400-01 (1992) ("cross-examination is required in order to ensure that due process requirements are met"). The consideration of evidence, without allowing an opposing party the opportunity to cross-examine or respond, contravenes due process. *See*, *e.g.*, *Ill. Comm. Comm'n v. Ill. Gas Co.*, Docket 02-0170, Order, 2003 Ill. PUC LEXIS 682, *35-36 (Aug. 6, 2003) (no consideration given to expert qualifications submitted for the first time in reply brief on exceptions); *Ill. Bell Tel. Co.*, Docket 00-0260, Order, 2001 Ill. PUC LEXIS 871, *20-21 (Sept. 12, 2001) (auditor's participation in proceeding critical to afford parties opportunity to present and cross-examine witnesses relative to the issue of tracking merger related costs in order for due process concerns to be satisfied); *Commonwealth Edison Co.*, Docket 92-0121, Order, 1995 Ill. PUC LEXIS 232, *25-26 (Apr. 12,

1995) (no consideration given to proposal offered after evidentiary hearing concluded without benefit of fundamental right to cross-examination by the other parties); *Ill. Comm. Comm'n*, Docket 94-0066, Order, 1995 Ill. PUC LEXIS 176, *266-68 (Feb. 23, 1995) (late introduction of Staff's new modifications proposed for the first time in brief, which were not tested in cross-examination and which no party had the opportunity to address for the record, would violate fundamental fairness and abridge other parties' due process). The opportunity to confront opposing litigants is essential in order to test the basis for their positions; without that opportunity, litigants are precluded from assessing the strength of the factual evidence underling an opposing party's assertions, and conversely expose the weakness of unsupported conjecture.

A coordinated case schedule is established in Commission proceedings to allow for an orderly presentation of the evidence and the parties' positions. This process ensures utilities have the opportunity to cross-examine adverse witnesses and submit evidence in response to their claims. That orderly presentation and the required opportunity to respond, however, cannot happen, when post-hearing briefing becomes the mechanism to unveil new positions or buttress prior positions with new evidence or assertions. This is not to say that parties must testify on legal arguments. But parties must give notice of expert opinions and recommendations and present them through witness testimony or other evidence. The conjecture of counsel in a brief is not a substitute for the timely disclosure of substantive proposals. The right to confront witnesses in the hearing room is a fundamental right of any litigant. This is precisely why the Commission has rounds of prefiled testimony: to disclose positions and allow parties to respond.

In this instance, the statements in items Nos. 1-3 of the Supplemental Appendix are new Staff opinions and the statements in items Nos. 4-7 are new Staff positions. In either instance, the new opinion or new position should not be unveiled for the first time in a reply brief; they

should have been supported by witness testimony. Since they were not, AIC did not have the opportunity to test Staff's new assertions about the necessity of televisions and cable television service; AIC did not have the opportunity to test Staff's new assertions about the necessity of employee cell phones and the procedures governing their purchase; and AIC did not have the opportunity to test the basis for Staff's new agreement with AG's positions. As noted in AIC's Motion to Strike, the nature of litigation is for one to fully present his or her case and have the opportunity to fully challenge the other's case, both before and during the hearing, and not just after. This process helps to ensure the due process rights of the petitioner are not violated. But this process breaks down once parties are able to mutely participate in a Commission proceeding and then unveil brand new positions in post-hearing briefs. Staff's withholding of assertions in the Supplemental Appendix until Staff's Reply Brief prevented AIC from testing the merits of Staff's opinions and positions through surrebuttal testimony or cross-examination.

B. The Commission May Not Consider Opinions Not in the Record Evidence.

As noted in October 9, 2013 Motion to Strike, in all rate proceedings conducted by the Commission, "any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case." 220 ILCS 5/10-103; *see also* 5 ILCS 100/10-35(c) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed."); 83 Ill. Adm. Code § 200.800(a) ("Statements of fact in briefs and reply briefs should be supported by citation to the record."); *Chicago & E.I. Ry. Co. v. Ill. Comm. Comm'n*, 341 Ill. 277, 285 (1930) (Commission findings "must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."). To do otherwise

constitutes reversible error. *Bus. & Prof'l. People for Pub. Interest v. Ill. Comm. Comm'n*, 136 Ill. 2d 192, 227 (1989) (Commission committed reversible error when it disregarded record evidence on the issue of used and useful and improperly relied on the circumstances of a settlement). To the extent new opinions are arguments of counsel, they are not evidence on which the Commission can base a decision. *Johnson v. Lynch*, 66 Ill. 2d 242 at 246 ("The argument of counsel cannot be considered evidence….").

The statements in items Nos. 1-3 do not constitute "evidence" admitted into the record. Therefore, the Commission cannot rely on them for its findings and decisions. That Staff's brief may be part of the record on appeal does not mean the Commission can rely on theories that should have been disclosed in prefiled testimony. There is a stark difference between a legal argument that applies prior Commission decisions, statutes and administrative rules and the ratemaking opinions customarily offered by Staff witnesses in testimony. The Staff opinions in items Nos. 1-3 are most certainly the latter. The Commission cannot base its findings on Staff's adjustments to credit card purchases on these opinions without producing grounds for reversal.

IV. CONCLUSION

For the reasons set forth in this Supplemental Motion and the October 9, 2013 Motion to Strike, the Commission should give no consideration to the opinions in the Supplemental Appendix, should grant AIC's request to strike them from Staff's Reply Brief, and should take action to ensure they are not improperly included in the final order. To do otherwise would constitute reversible error and a violation of due process by the Commission.

No.	Objectionable New Opinions in Staff's Reply Brief	Citation
1	"It is unclear exactly why AIC purchases 'reliable, real-time information on local news stories and extreme weather events' by watching the same weather information that is broadcast free to the public through the internet, radio and local TV stations as it happens. It is equally unclear why AIC's system used to dispatch information to field personnel during normal work operations is not the primary means of communicating pertinent storm outage information to necessary personnel, instead of satellite television weather reports which duplicate information also monitored on computer and Internet resources."	Staff Rep. Br., p. 20.
2	"It is unclear exactly how AIC employees 'meet customer expectations in the event of storm outages' by watching the same weather information that is broadcast free to the public through the internet, radio and local TV stations as it happens. It is equally unclear why AIC's system used to dispatch field personnel during normal work operations is not the primary means of communicating pertinent storm outage information to necessary personnel, instead of satellite television weather reports on flat screen TVs, as part of AIC's storm preparedness and response efforts."	Staff Rep. Br., p. 21.
3	"Given that AIC's current communication system already allows it to communicate with, and dispatch, employees to areas during normal work operations and during emergencies, it is unclear why employees need to have cell phones supplied by the Company. Assuming it was truly necessary for AIC's storm preparedness to have such cellular phones, and Staff does not concede that it is, it is reasonable to expect the Company to have provided such phones through a Company-wide contract obtained through a normal purchasing function. Such action would ensure that every employee who needs a cellular phone to do their jobs would have the cellular phone (1) in a timely manner; (2) at a Company-approved cost; (3) through an appropriate vendor; and (4) with the necessary features. The Company, however, has not done any of this.	Staff Rep. Br., p. 22.
4	"The AG proposed an adjustment increasing the Company's Miscellaneous Operating Revenues for "vacating frequencies under Microwave Relocation Contracts." (AG IB, 29-34.) While Staff did not take a position on this issue in testimony in this proceeding, Staff supports this adjustment by the AG because, as the AG correctly points out, 'such revenues are not reflected in either the transmission of the distribution revenue requirement . . . ratepayers are unfairly and unreasonably denied the benefit of these revenues.' (Id., 33.) However, it is unclear which allocator should be used for the calculation of the adjustment. In rebuttal testimony, the AG recommends that 92.06% of the revenues from the "sale of spectrum" be allocated to distribution. (AG Ex. 3.0, 6:132-134.) But in the AG's IB, the AG references AG Exhibit 1.3, which bases the adjustment for these revenues on the AIC Net Plant Allocation Factor of 79.99%. (AG IB, 34.) Since the AG's rebuttal testimony also references AG Exhibit 1.3 in its ultimate recommendation (Id., 7:135 – 139.), Staff supports the $1,028,180 increase to the Company's Miscellaneous Operating Revenues that reflects a 79.99% allocation factor for distribution."	Staff Rep. Br., p. 16.

5	"As an alternative to Staff's $68,000 FEFL adjustment, AG witness Brosch recommended that 100% or $95,705 of the payments to Simantel be disallowed. (AG Ex. 1.3 Corrected, 1; AG IB, 37-41.) Staff is not opposed to the AG's FEFL adjustment."	Staff Rep. Br., p. 31.
6	"In addition, AG witness recommended that 50% or $298,242 of remaining public relation expenses paid to Simantel (i.e., the non-FEFL expenses or $743,635 - $95,705 x 92.06%) be disallowed. (AG Exhibit 1.3 Corrected, 3; AG IB, 37.) Staff supports this additional adjustment."	Staff Rep. Br., p. 31.
7	"AG witness Brosch proposed to disallow (AG IB, 41-44) the following public relations expenses from the 2012 reporting year revenue requirement, as shown on AG Exhibit 1.3 Corrected, page 3: · Line 7, Karen Foss LLC, $42,015 of promotional, goodwill or image improvement advertising that is prohibited in Section 9-225(1)(a) of the Act (AG IB, 42.); · Line 10, Obata Design, Inc., $5,989 relates to corporate goodwill and image enhancement (AG IB, 43-44.); and · Line 13, St. Louis Business Journal, $13,995 of conference expenses that are unrelated to electricity delivery service and constitute corporate image enhancement or goodwill advertising. (AG IB, 42.) Staff agrees that these are expenses for the type of promotional and goodwill advertising that is prohibited by Section 9-225(1)(a) of the Act. Staff therefore supports disallowance of these amounts."	Staff Rep. Br., p. 32.

Dated: October 17, 2013

Respectfully submitted,

Ameren Illinois Company
d/b/a Ameren Illinois

/s/ Albert D. Sturtevant

One of their Attorneys

Edward C. Fitzhenry
Matthew R. Tomc
Eric Dearmont
AMEREN SERVICES COMPANY
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
(314) 554-3533
(314) 554-4014 (fax)
efitzhenry@ameren.com
mtomc@ameren.com
edearmont@ameren.com

Mark A. Whitt
Christopher T. Kennedy
WHITT STURTEVANT LLP
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
(614) 224-3911
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com

Albert D. Sturtevant
Anne M. Zehr
Rebecca L. Segal
Hanna M. Conger
WHITT STURTEVANT LLP
180 N. LaSalle Street, Suite 2001
Chicago, Illinois 60601
(312) 251-3017
sturtevant@whitt-sturtevant.com
zehr@whitt-sturtevant.com
segal@whitt-sturtevant.com
conger@whitt-sturtevant.com

CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on October 17, 2013, I caused a copy of the foregoing *Supplemental Motion of Ameren Illinois Company to Strike Portions of the Reply Brief of the Staff of the Illinois Commerce Commission* to be served by electronic mail to the individuals on the Commission's Service List for Docket 13-0301.

/s/ Albert D. Sturtevant
Attorney for Ameren Illinois Company